

*NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.*

**Santos Cruz LLC d/b/a Filiberto's and Jairo E. Aguirre, an individual.** Case 28–CA–221286

September 24, 2019

**DECISION AND ORDER**

BY CHAIRMAN RING AND MEMBERS MCFERRAN  
AND EMANUEL

The General Counsel seeks a default judgment in this case pursuant to the terms of an informal settlement agreement. Upon a charge filed by Jairo E. Aguirre on May 30 and amended on August 30, 2018,<sup>1</sup> the General Counsel issued a complaint on September 25, alleging that Santos Cruz LLC d/b/a Filiberto's (the Respondent) violated Section 8(a)(1) of the Act by various actions. The Respondent did not file an answer to the complaint.

Subsequently, the parties executed a bilateral informal settlement agreement, which the Regional Director for Region 28 approved on November 7. Pursuant to the terms of the settlement agreement, the Respondent agreed to post a notice to employees at its facility in Anthem, Arizona. It also agreed to comply with the provisions of the notice to employees, which included making Aguirre whole for any loss of earnings and other benefits suffered as a result of his discharge,<sup>2</sup> removing from its files all references to his discharge, and notifying Aguirre in writing that it had taken such action and that the discharge would not be used against him in any way. The Respondent also agreed that it would make Aguirre whole by paying him backpay in the amount of \$7896, minus appropriate deductions, and interest in the amount of \$95. Finally, it agreed to notify the Regional Director of the steps it had taken to comply with the settlement agreement. The settlement agreement also contains the following noncompliance provision:

The Charged Party agrees that in case of non-compliance with any of the terms of this Settlement Agreement by the Charged Party; and after 14 days' notice from the Regional Director of the National Labor Relations Board of such non-compliance without remedy by the Charged Party, the Regional Director will reissue the complaint previously issued on September 25, 2018 in the instant case(s). Thereafter, the General Counsel may file a motion for default judgment with the Board on the allegations of the complaint. The Charged Party understands and agrees that

the allegations of the aforementioned complaint will be deemed admitted and its Answer to such complaint will be considered withdrawn. The only issue that may be raised before the Board is whether the Charged Party defaulted on the terms of this Settlement Agreement. The Board may then, without necessity of trial or any other proceeding, find all allegations of the complaint to be true and make findings of fact and conclusions of law consistent with those allegations adverse to the Charged Party on all issues raised by the pleadings. The Board may then issue an order providing a full remedy for the violations found as is appropriate to remedy such violations. The parties further agree that a U.S. Court of Appeals Judgment may be entered enforcing the Board order ex parte, after service or attempted service upon Charged Party/Respondent at the last address provided to the General Counsel.

On November 9, a Board agent sent the Respondent a package of information containing copies of the notice to employees and a certification of compliance form detailing the Respondent's obligations under the settlement agreement, to be signed by an official of the Respondent. Thereafter, by letter dated December 11, the Board agent notified the Respondent that it had failed to comply with the terms of the settlement agreement and that the settlement agreement provided that if it failed to comply with any of its terms after 14 days' notice, the Regional Director would issue a complaint and thereafter file a motion for default judgment with the Board on the allegations of the complaint. The Board agent stated that unless the Respondent initiated compliance by December 26, the Region would issue a complaint. On January 23, 2019, the Board agent, by letter, informed the Respondent and its non-attorney representative that it had failed to comply with the settlement agreement and that if it had not complied by January 30, 2019, the Regional Director would issue a complaint and institute default judgment proceedings as provided in the "Performance" paragraph of the settlement agreement. The Respondent failed to cure its lack of compliance.

Accordingly, on March 20, 2019, pursuant to the non-compliance provision set forth above, the Regional Director issued a complaint based on breach of affirmative provisions of settlement agreement (the reissued complaint). On March 27, 2019, the General Counsel filed a Motion for Default Judgment with the Board. On March 29, 2019, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent did not file a response. The allegations in the motion are therefore undisputed.

<sup>1</sup> All subsequent dates are in 2018 unless otherwise indicated.

<sup>2</sup> Aguirre waived reinstatement in the settlement.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

#### Ruling on Motion for Default Judgment

According to the uncontroverted allegations in the Motion for Default Judgment, the Respondent has failed to comply with the terms of the Agreement. Consequently, pursuant to the noncompliance provisions of the settlement agreement set forth above, we find that all of the allegations in the complaint are true. Accordingly, we grant the General Counsel's Motion for Default Judgment.

On the entire record, the Board makes the following

#### FINDINGS OF FACT

##### I. JURISDICTION

At all material times, the Respondent has been a limited liability company with an office and place of business in Anthem, Arizona (the Respondent's facility), and has been engaged in the business of operating a public restaurant selling food and beverages. In conducting its business operations during the 12-month period ending May 30, 2018, the Respondent purchased and received at its facility goods valued in excess of \$5000 directly from points outside the State of Arizona. In conducting its operations during the same 12-month period, the Respondent derived gross revenues in excess of \$500,000. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

##### II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of the Respondent within the meaning of Section 2(11) of the Act and agents of the Respondent within the meaning of Section 2(13) of the Act:

Manuel Santos Cruz     Owner

Jose Santos               Owner

At all material times, the following individuals held the positions set forth opposite their respective names and have been agents of the Respondent within the meaning of Section 2(13) of the Act:

Margarita Santos     -Wife of Manuel Santos Cruz

Antonio Padilla        -Accountant for the Respondent

On various dates between about May 6 and 24, the Respondent's employee Aguirre engaged in concerted activities with other employees for the purposes of mutual aid and protection and concertedly complained to the Respondent about the terms and conditions of employ-

ment of the Respondent's employees, by raising concerns with other employees and with the Respondent about the employees' wages, hours, and working conditions. These concerns included conflicts between Manuel Santos Cruz and Margarita Santos in the workplace that created a hostile work environment for the employees, mistreatment of and disrespect shown to employees by supervisors, and practices concerning the sharing of tips.

About May 22, 2018, the Respondent, by Manuel Santos Cruz, at its facility, (1) directed its employees to investigate other employees' protected concerted activities and report them to the Respondent; (2) threatened its employees with unspecified reprisals for engaging in protected concerted activities; (3) directed its employees to refrain from engaging in such activities; and (4) invited its employees to quit in response to their protected concerted activities.

About May 24, 2018, the Respondent discharged Aguirre.

About June 25, 2018, the Respondent, by Antonio Padilla at Padilla's office, interrogated its employees about the protected concerted activities of employees in two separate conversations.

The Respondent engaged in this conduct because Aguirre engaged in the conduct described above and to discourage employees from engaging in these or other concerted activities.

#### CONCLUSION OF LAW

By the conduct described above, the Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1) of the Act. The Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, having found that the Respondent violated Section 8(a)(1) of the Act by directing its employees to investigate other employees' protected concerted activities and report them to the Respondent; threatening employees with unspecified reprisals for engaging in protected concerted activities; directing its employees to refrain from engaging in protected concerted activities; inviting its employees to quit in response to their protected concerted activities; discharging Jairo E. Aguirre; and coercively interrogating employees about the protected concerted activities of employees, we shall order the Re-

spondent to cease and desist from such conduct and to post a remedial notice.

To remedy the Respondent's unlawful discharge of Aguirre, we shall order the Respondent, to the extent that it has not already done so, to offer Aguirre full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges he previously enjoyed.<sup>3</sup> In addition, we shall order the Respondent to make Aguirre whole for any loss of earnings and other benefits suffered as a result of the unlawful action against him, to the extent that the Respondent has not already done so.<sup>4</sup> Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with our decision in *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. in relevant part, 859 F.3d 23 (D.C. Cir. 2017), we shall also order the Respondent to compensate Aguirre for his search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.<sup>5</sup> We shall further order the Respondent to compensate Aguirre for any adverse tax consequences of receiving a lump-sum backpay award, to the extent that the Respondent has not already done so, and to file with the Regional Director for Region 28 a report allocating the backpay award to the appropriate calendar years. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016). Finally, we shall order the Respondent to remove from its files any reference to the unlawful discharge of Aguirre and to notify him in writing that this has been done and that the unlawful discharge will not be used against him in any way.

<sup>3</sup> Although Aguirre waived reinstatement for the purposes of the settlement, we shall order it as part of a full remedy for his unlawful discharge.

<sup>4</sup> Because it is unclear whether the total amount set forth in the settlement agreement constitutes a full make-whole remedy, we leave to compliance a determination of the proper amount due to Aguirre.

<sup>5</sup> The General Counsel additionally seeks reasonable consequential damages incurred as a result of the Respondent's unfair labor practices. This issue, which was not briefed, would involve a change in Board law. We are not prepared at this time to deviate from our current remedial practice. Accordingly, we decline to order this relief. See, e.g., *Laborers International Union of North America, Local Union No. 91 (Council of Utility Contractors)*, 365 NLRB No. 28, slip op. at 1 fn. 2 (2017).

## ORDER

The National Labor Relations Board orders that the Respondent, Santos Cruz, LLC, d/b/a Filiberto's, Anthem, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Directing employees to investigate other employees' protected concerted activities and report them to the Respondent.

(b) Threatening employees with negative consequences for engaging in protected concerted activities.

(c) Directing employees not to engage in protected concerted activities.

(d) Inviting employees to quit in response to their protected concerted activities.

(e) Discharging employees because they engage in protected concerted activities.

(f) Coercively questioning employees about their protected concerted activities or the protected concerted activities of other employees.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Jairo E. Aguirre full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) To the extent it has not already done so, make whole Jairo E. Aguirre for any loss of earnings and other benefits suffered as a result of his discharge, in the manner set forth in the remedy section of this decision, plus reasonable search-for-work and interim employment expenses.

(c) Compensate Jairo E. Aguirre for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 28, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(d) Within 14 days from the date of this Order, remove from its files all references to the discharge of Aguirre and, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director for Region 28 may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll

records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Anthem, Arizona, copies of the attached notice marked "Appendix."<sup>6</sup> Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent, in English and in additional languages if the Regional Director decides that it is appropriate to do so, and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 6, 2018.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 28 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 24, 2019

\_\_\_\_\_  
John F. Ring, Chairman

\_\_\_\_\_  
Lauren McFerran, Member

\_\_\_\_\_  
William J. Emanuel Member

<sup>6</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(SEAL) NATIONAL LABOR RELATIONS BOARD

## APPENDIX

### NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT do anything to prevent you from engaging in protected concerted activities, including raising concerns with other employees about your wages, hours, and working conditions, or acting together with other employees to raise such concerns with us.

WE WILL NOT direct you to investigate other employees' protected concerted activities and report them to us.

WE WILL NOT threaten you with negative consequences for engaging in protected concerted activities.

WE WILL NOT direct you not to engage in protected concerted activities.

WE WILL NOT invite you to quit in response to your protected concerted activities.

WE WILL NOT fire you for engaging in protected concerted activities.

WE WILL NOT coercively question you about your protected concerted activities or the protected concerted activities of other employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights under Section 7 of the National Labor Relations Act.

WE WILL, within 14 days from the date of the Board's Order, offer Jairo E. Aguirre full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges enjoyed.

WE WILL make Aguirre whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest, to the extent this has

not already been done, and WE WILL also make Aguirre whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Aguirre for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 28, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

WE WILL, within 14 days of the date of the Board's Order, remove from our files all references to the discharge of Aguirre, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

SANTOS CRUZ LLC, D/B/A FILIBERTO'S

The Board's decision can be found at [www.nlrb.gov/case/28-CA-221286](http://www.nlrb.gov/case/28-CA-221286) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

